Supreme Court, U. S.
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80-1187
NO. ———

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

WILLIAM H. SPENCER, INDIVIDUALLY AND d/b/a IRVING EQUIPMENT AND CONSTRUCTION COMPANY,

Petitioner,

VS.

HOWE RICHARDSON SCALE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
NUMBER BELOW: 80-1118

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Attorneys for Petitioner

QUESTION PRESENTED

DID THE COURTS BELOW ERR BY REFUSING TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST PETITIONER AND IN FAVOR OF RESPONDENT?

Petitioner, William H. Spencer, respectfully petitions this Court for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment and order entered in that Court in its Cause No. 80-1118, wherein this petitioner was appellant-petitioner and this respondent was appellee-respondent.

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JURISDICTION

The judgment of the Court of Appeals affirming the order of the District Court which denied Petitioner's motion to set aside the default judgment entered against him was filed on August 25, 1980 (A. 13). A petition for rehearing was timely filed on September 8, 1980, and the order of the Court of Appeals denying that petition was filed on October 15, 1980 (A. 14). Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C.A. §1254(1).

STATUTES INVOLVED

Fed. Rules Civ. Proc. Rule 55(b)(2), 28 U.S.C.A.

(b) *Judgment.* Judgment by default may be entered as follows:

. . . . .

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor. . . . If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

Fed. Rules Civ. Proc. Rule 55(c), 28 U.S.C.A.

> (c) *Setting Aside Default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Fed. Rules Civ. Proc. Rule 60(b), 28 U.S.C.A.

> (b) Mistakes; Inadvertance; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect. . . . or (6) any other reason justifying relief from the operation of the judgment. . . .

STATEMENT OF THE CASE

The Proceedings and the Disposition of the Case in the Courts Below

On March 22, 1978, a default judgment in the sum of $36,060.23 with costs was entered against Petitioner and in favor of Respondent by Honorable Robert M. Hill in the United States District Court for the Northern District of Texas, Dallas Division (A. 3). Petitioner moved to set aside that judgment on April 17, 1978, and a hearing on the motion was held on May 16, 1978 (A. 4, 5). On January 4, 1980, Judge Hill entered an order denying Petitioner's motion to set aside the default judgment (A. 5). Federal jurisdiction in the District Court was based on 28 U.S.C.A. §1332. Respondent alleged that it was a Delaware corporation, authorized to do business in Texas and with its principal place of business in New Jersey. Petitioner was, and still is, a Texas resident.

On February 1, 1980, Petitioner appealed the denial of his motion to set aside the default judgment to the United States Court of Appeals for the Fifth Circuit. A three-judge panel of the Court of Appeals placed the case on its summary calendar for disposition, and on August 25, 1980, the panel affirmed the denial of Petitioner's motion on the basis of the order entered by Judge Hill on January 4, 1980 (A. 13). On October 15, 1980, the same three-judge panel of the Court of Appeals denied the petition for rehearing filed by Petitioner in this cause (A. 14).

The Facts

In December, 1975, Petitioner and Respondent entered into a contract wherein Petitioner, in consideration for

money payment, agreed to construct a truck scale installation pit and foundation for Respondent at a site in Brownsville, Texas. In June, 1976, the parties entered into a similar contract for the construction of another installation pit and foundation at a site in Harris County, Texas. Petitioner completed the work on both jobs. In July of 1976, however, Respondent informed Petitioner that his work on both jobs was faulty, and it demanded that Petitioner reconstruct both installation pits and foundations. At this time Petitioner had been paid in full for the Harris County job, but was only partially paid for the Brownsville job. Petitioner did not do any reconstruction at either site.

In July, 1977, Respondent's attorney wrote a letter to Petitioner claiming that both pits and foundations had been reconstructed, and he demanded that payments be made to Respondent for reconstruction costs in the sum of $34,110.23 (A. 15). Shortly thereafter, Petitioner responded by requesting verification of Respondent's claims and indicating a willingness to agree upon a settlement once the information was received. Respondent's attorney then sent Petitioner various invoices in support of Respondent's claims. Petitioner was not satisfied with this information, however, and immediately wrote another letter to Respondent's attorney requesting conclusive proof that the invoices were paid. Respondent's attorney, in turn, supplied Petitioner with some additional information and some cancelled checks in a letter dated August 21, 1977. He concluded that letter by requesting Petitioner to reply within five days so the parties could proceed with a settlement. On August 26, 1977, Petitioner's wife wrote a letter to Respondent's attorney informing him that Petitioner was out of town on a job and that Petitioner would contact him as soon as he returned.

On September 12, 1977, Respondent filed suit against Petitioner, alleging breach of contract and requesting $34,110.23 in damages. Petitioner followed the instructions in the citation served him by the marshal (A. 17) by writing a letter to Respondent's attorney on September 26, 1977. Specifically, the letter stated, "This letter is to comply to your summons dated September 12, 1977." The September 26 letter also contained a letter dated September 12, 1977, which Petitioner had originally written to Respondent's attorney in reply to his August 21 letter (A. 18). In the September 12 letter, Petitioner disputed the extent of the liability claimed by the Respondent on the Brownsville job, and requested further verification of Respondent's claims on the Harris County job (A. 19).

Over a month later, on October 17, 1977, Respondent's attorney again wrote Petitioner. He began the letter by communicating to Petitioner the Respondent's position regarding its claims on the Brownsville job. Then, in reference to Petitioner's request for further verification of the Harris County job, Respondent's attorney stated, "If you seriously wish to satisfy your obligations without resort to additional legal proceedings, we will be happy to attempt to obtain a copy of this check from Harris County." He then concluded the letter by stating:

> Inasmuch as you have requested this additional information, Howe Richardson has postponed the institution of default proceedings against you. If no further response is received from you within three (3) days of receipt of this letter, Howe Richardson will proceed to institute the necessary default proceedings.

(A. 20).

No default proceedings were instituted at that time. On November 1, 1977, however, Petitioner responded to Respondent's attorney by pointing out errors in Respondent's calculations regarding his liability on the Brownsville job, and by again requesting cancelled checks as proof of Respondent's claims on the Harris County job. He concluded his letter by stating, "Please have Howe Richardson Scale Co. supply you with detailed information . . . so that we will be able to agree on a settlement" (A. 21).

Respondent's attorney did not attempt to communicate with Petitioner again until February 1, 1978. On that date, Respondent's attorney sent a certified letter to Petitioner stating that he was obtaining a copy of the check that Petitioner sought regarding the Harris County job, and that he would forward the check upon receipt. He then concluded:

> At this time we do not forsee any further information that you may need in evaluating your position. Since you have failed to file an answer in federal court as required by the Federal Rules of Civil Procedure, you leave us no choice but to request a hearing for default judgment against you unless we hear from you concerning a firm offer of compromise in this case within five days of receipt of this letter.

Petitioner never received this letter, however, since it was returned to Respondent's attorney marked "Unclaimed" (A. 6).

On February 22, 1978, Respondent filed a Motion for Entry of Default Judgment in the District Court. Entry of

Default was made by the clerk on February 23, and on February 24, Respondent filed a Motion for Default Judgment (A. 6). Although Respondent contends that copies of both motions were sent to Petitioner on their respective filing dates, Petitioner testified during the hearing on his motion to set aside the default judgment that he never received a copy of either motion. There was no evidence in the record below to indicate that either of the alleged letters containing the copies were certified with return receipt requested.

On March 2, 1978, the District Court granted Respondent's Motion for Default Judgment (A. 2). On March 6, 1978, Respondent's attorney sent Petitioner a certified letter with a copy of the District Court's Order granting the Respondent's Motion for Default Judgment and setting the hearing on damages for March 21. Petitioner testified during the hearing on his motion to set aside the default judgment that he had been working out of town during the first two weeks in March, and therefore he did not receive the letter until he returned home on the afternoon of March 21, after the hearing and entry of judgment that morning. He also testified that his family had failed to pick up the letter prior to March 21 because his wife worked and his children were in school during mail delivery hours.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

NO. ————

WILLIAM H. SPENCER, INDIVIDUALLY AND
d/b/a IRVING EQUIPMENT AND
CONSTRUCTION COMPANY,

Petitioner,

VS.

HOWE RICHARDSON SCALE COMPANY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NUMBER BELOW: 80-1118**

ARGUMENT

Under Fed. R. Civ. P. 55(b)(2), if a party against whom a default judgment is sought has appeared in the action, he shall be served with written notice of the application for the judgment at least three days prior to the hearing on the application. An appearance need not be a formal court appearance, but may result when the party against whom a default judgment is sought has notified the party seeking the judgment of an intent to defend the action. *Charlton L.*

Davis & Company, P. C. v. Fedder Data Center, Inc., 556 F.2d 308, 309 (5th Cir. 1977); *Baez v. S. S. Kresge Company*, 518 F.2d 349, 350 (5th Cir. 1975), cert. denied, 425 U.S. 904 (1976).

The exercise of a district court's authority to enter a default judgment is discretionary, and is subject to review for abuse of discretion. *E. F. Hutton & Company, Inc. v. Moffatt*, 460 F.2d 284, 285 (5th Cir. 1972); *Flaska v. Little River Marine Construction Co., Inc.*, 389 F.2d 885, 887 (5th Cir. 1968). The entry of a default judgment, however, is a drastic remedy and should be resorted to only in extreme situations. It is only appropriate where there has been a clear record of delay or contumacious conduct. *Turner v. Salvatierra*, 580 F.2d 199, 201 (5th Cir. 1978); *Charlton L. Davis & Company, P. C. v. Fedder Data Center, Inc., supra*; *E. F. Hutton & Company, Inc. v. Moffatt, supra; Flaska v. Little River Marine Construction Co., Inc., supra.*

Fed. R. Civ. P. 55(c) provides that default judgments may be set aside in accordance with Rule 60(b). Fed. R. Civ. P. 60(b) provides that a district court may grant relief to a party seeking to set aside a default judgment upon a showing of mistake, inadvertance, surprise, excusable neglect, or any other reason justifying relief from the operation of the judgment. Additionally, the Court of Appeals for the Fifth Circuit has held that a party seeking to set aside a default judgment must show a meritorious defense to the action, or, at least, a "hint" of a suggestion of a meritorious defense. *United Artists Corporation v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979); *McGrady v. D'Andrea Electric, Inc.*, 434 F.2d 1000, 1001 (5th Cir. 1970); *Moldwood Corporation v. Stutts*, 410 F.2d 351, 352 (5th Cir. 1969).

Like the entry of a default judgment, the exercise of a

district court's authority to set aside a default judgment is discretionary, and is subject to review for abuse of discretion. *McGrady v. D'Andrea Electric, Inc., supra.* In the exercise of a district court's discretion in ruling on a motion to set aside a default judgment, the good faith or lack thereof of the party who has obtained the judgment is a factor to be considered. Additionally, all doubts relating to the entry of the default judgment should be indulged in favor of the party seeking to set aside the judgment. Wright & Miller, *Federal Practice and Procedure,* Civil §2693.

PETITIONER WAS NOT GIVEN ADEQUATE NOTICE UNDER FED. R. CIV. P. 55(b)(2) OF THE DEFAULT JUDGMENT PROCEEDINGS INITIATED AGAINST HIM BY RESPONDENT.

Petitioner was never served with written notice of Respondent's application for default judgment as is required by Fed. R. Civ. P. 55(b)(2), and, additionally, Petitioner was never served with written notice of Respondent's application for default judgment at least three days prior to the hearing on Respondent's application for default judgment as is required by Fed. R. Civ. P. 55(b)(2).

Respondent contends that copies of both its Motion for Entry of Default Judgment and its Motion for Default Judgment were sent to Petitioner on their respective filing dates. Petitioner testified, however, that he never received a copy of either motion. Although Respondent introduced into evidence copies of letters which it alleged were sent to Petitioner with the motions, there was no evidence to indicate that either of the alleged letters were certified with return receipt requested, unlike the great majority

of the letters sent to Petitioner by Respondent during their negotiations.

Neither Respondent's October 17 letter nor its February 1 letter gave Petitioner notice of Respondent's actual application for default judgment. In addition, the record is clear, and the District Court neld, that Respondent's February 1 letter was returned to it marked "unclaimed". Respondent's letter of March 6 was sent to Petitioner after the hearing on Respondent's application for default judgment, and therefore it too was insufficient notice of that hearing.

THERE WAS NO CLEAR RECORD OF DELAY OR CONTUMACIOUS CONDUCT BY PETITIONER.

Petitioner testified during the hearing on his motion to set aside the default judgment that he thought the manner in which he answered Respondent's complaint was proper. In addition, Petitioner believed that his negotiations with Respondent were the proper means of handling Respondent's claims. Although the District Court held that Respondent's letters made it clear to Petitioner that he was in default (A. 10),* Petitioner contends that Respondent's letters encouraged his manner of handling the claims. For instance, Respondent's October 17 letter stated, "If you seriously wish to satisfy your obligation without resort to additional legal proceedings, we will be happy to attempt to obtain a copy of this check from Harris County" (A. 20).

The facts clearly indicate that Petitioner was always

*Since the Court of Appeals affirmed the denial of Petitioner's motion to set aside the default judgment on the basis of the District Court order, that order is the focal point for review.

quick to respond to Respondent's letters. In fact, Respondent caused the greatest delay during the negotiations by waiting a full three months to reply to Petitioner's November 1 letter. Respondent also caused the greatest stumbling block to reaching a settlement. Petitioner reiterated the importance of the Harris County canceled checks in his November 1 letter, and Respondent's attorney still had not obtained them as of his February 1 letter. In fact, Petitioner was still waiting for the checks when Respondent filed his application for default judgment on February 22.

Petitioner testified during the hearing on his motion to set aside the default judgment that he had never been served before and that he had never hired an attorney before. He had always settled his disputes without litigation, and he had always negotiated those settlements by himself, without counsel. Although Petitioner demonstrated his ignorance of the legal rules of procedure during his negotiations with Respondent, Petitioner did not demonstrate acts of intentional delay or contumacious conduct prior to the entry of the default judgment.

PETITIONER SHOWED GOOD REASON TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST HIM.

Respondent's failure to adequately notify Petitioner of the default proceedings initiated against him provides sufficient reason to set aside the default judgment. *Turner v. Salvatierra,* 580 F.2d 199, 201 (5th Cir. 1978); *Charlton L. Davis and Company, P. C. v. Fedder Data Center, Inc.,* 556 F.2d 308, 309 (5th Cir. 1977).

Assuming, arguendo, that the Court holds that there

was sufficient notice to meet the requirements of Fed. R. Civ. P. 55(b)(2), Petitioner contends that his failure to receive that notice was caused by excusable neglect. First, Respondent's letter of October 17 led Petitioner to believe that he was handling Respondent's claims correctly. Second, the correspondence which Petitioner anticipated receiving from Respondent was a letter containing the canceled Harris County checks, not a notice of default proceedings. Third, Petitioner's testimony indicated that he missed receiving some of his certified mail during the periods of time involved in 1978 because his work required him to be out of town frequently. Also, it was shown that Petitioner's wife worked and his children were in school during mail delivery hours. Fourth, there was no evidence to indicate that Petitioner was intentionally avoiding Respondent's letters. To the contrary, Petitioner picked up the March 6 letter as soon as he returned to town on March 21. Finally, Petitioner contends that the only letter he failed to receive was the letter of February 1. Petitioner contends that the alleged letters of February 22 and 24 were never sent.

PETITIONER SHOWED MERITORIOUS DEFENSES TO RESPONDENT'S CAUSE OF ACTION.

Although Petitioner admitted some liability on the Brownsville job, his September 12 letter stated, "It is my understanding that the only repair needed on the Brownsville job was the deck." He also stated, "The extra charge for removal and replacement of neck deck, repair of existing concrete alongside the scale, two approaches and two extra day's labor is not my liability." Petitioner then demanded that he receive credit for amounts never paid him

under the contract (A. 15, 19). In Petitioner's November 1 letter, he reiterated his claims:

> Please explain how Howe Richardson Scale Company can expect any payment at all from us for the Brownsville job when we were never paid for it. Even though the deck, being 25% of the job, was faulty construction, the floor and piers, the side and end walls, being 75% of the job, are still being used.

(A. 21).

Petitioner denied faulty workmanship on the Harris County job at the hearing on his motion to set aside the default judgment. By denying fault, Petitioner was contending, in effect, that he performed the job in a skillful and workmanlike manner. Surely, this is demonstrating a "hint" of a meritorious defense to an allegation of "faulty performance." See *Turner v. Salvatierra,* 580 F.2d 199, 201 (5th Cir. 1978) (denial of privity of contract).

CONCLUSION

For the reasons given, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, TOM S. McCORKLE, Counsel for Petitioner, WILLIAM H. SPENCER, Individually and d/b/a IRVING EQUIPMENT AND CONSTRUCTION COMPANY, hereby certify that copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to the following person: Steven R. McCown, Clerk, West, Keller, Butler & Ellis, 4949 First International Building, Dallas, Texas 75270 by placing same in the United States Mail, certified, postage prepaid on this the 13th day of January, 1981.

/s/ Tom S. McCorkle

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM H. SPENCES, INDIVIDUALLY AND
d/b/a IRVING EQUIPMENT AND
CONSTRUCTION COMPANY,

Petitioner,

vs.

HOWE RICHARDSON SCALE COMPANY,

Respondent.

PETITIONER'S APPENDIX

Proceedings In The District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY

vs. CA No. 3-77-1239-D

WILLIAM H. SPENCER, INDIVIDUALLY AND
d/b/a IRVING EQUIPMENT AND
CONSTRUCTION COMPANY

ORDER

On this day came on to be heard the motion of plaintiff Howe Richardson Scale Company for default judgment. The Court finds that defendant William H. Spencer, Individually and d/b/a Irving Equipment & Construction Company has failed to answer or otherwise appear herein as required by the Federal Rules of Civil Procedure and that a hearing should be held for determination of damages and any other relief to which Plaintiff may show itself entitled; it is accordingly,

ORDERED that the allegations of plaintiff Howe Richardson Scale Company's complaint be admitted by defendant William H. Spencer, Individually and d/b/a Irving Equipment & Construction Company as true as to liability due to defendant's default herein and that this cause be set for hearing as to damages and any other relief to which plaintiff may show itself entitled before the Court at 9:00 o'clock, a.m. on March 21, 1978.

DONE 3-2-78.

/s/ Robert M. Hill
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY

vs. CA No. 3-77-1239-D

WILLIAM H. SPENCER, INDIVIDUALLY AND
d/b/a IRVING EQUIPMENT AND
CONSTRUCTION COMPANY

FINAL JUDGMENT

On March 21, 1978, came on for hearing the above cause, plaintiff Howe Richardson Scale Company, a corporation, appearing by and through its attorney. Defendant William H. Spencer, Individually, and d/b/a Irving Equipment & Construction Company, although duly served with summons and complaint, failed to answer or otherwise appear. After considering the pleadings and orders on file, the evidence, and the argument of counsel for plaintiff, and being fully advised, the Court is of the opinion, and so finds, that plaintiff is entitled to judgment in the sum of $36,060.23 ($34,110.23 damages as prayed for in plaintiff's complaint, and $1,950.00 for reasonable attorney's fees) plus all costs of court.

IT is, accordingly, ORDERED, ADJUDGED AND DECREED that plaintiff, Howe Richardson Scale Company, does have and recover of and from defendant William H. Spencer, Individually, and d/b/a Irving Equipment & Construction Company, the sum of $36,060.23, with interest thereon at the lawful rate from the date hereof until paid, and all its costs of court.

DONE: March 22, 1978.

/s/ Robert H. Hill
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY,

Plaintiff,

vs. CA No. CA-3-77-1239-D

WILLIAM H. SPENCER, INDIVIDUALLY AND d/b/a IRVING EQUIPMENT AND CONSTRUCTION COMPANY,

Defendants.

ORDER

The motion to set aside final judgment filed by William H. Spencer, defendant, came on for consideration before the court, the Honorable Robert M. Hill, United States District Judge. The court has considered the motion and is of the opinion that the motion should be set for a hearing on May 16, 1978, at 1:30 p.m.

It is so ORDERED.

Dated this 21st day of April, 1978.

/s/ Robert M. Hill,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY,

Plaintiff,

vs. CA No. CA-3-77-1239-D

WILLIAM H. SPENCER, INDIVIDUALLY AND d/b/a IRVING EQUIPMENT AND CONSTRUCTION COMPANY,

Defendants.

ORDER

Came on for consideration the defendant's Motion to Set Aside Final Judgment filed on April 17, 1978. The court is of the opinion that the Motion should be denied.

Plaintiff's claims in this case arise out of two contracts entered into between the parties. One contract involved work to be performed by the defendant in Brownsville, Texas, and the other contract involved work to be performed by the defendant in Harris County, Texas. Prior to the filing of this suit, plaintiff's counsel and defendant through correspondence with each other entered into negotiations to settle plaintiff's claims. However, the parties were unable to resolve their differences. On September 12, 1977, plaintiff instituted this suit and defendant was served with summons. On September 26 the defendant responded to the service of summons by writing to plaintiff's counsel raising again questions about the amount owed under these claims and requesting supporting documents. On October 17 plaintiff's counsel responded by letter to the defendant

answering the questions raised by plaintiff and offering to obtain a copy of a document in support of its claims. Plaintiff's counsel concluded the October 17 letter by stating:

> Inasmuch as you have requested this additional information, Howe Richardson has postponed the institution of default proceedings against you. If no further response is received from you within three (3) days of receipt of this letter, Howe Richardson will proceed to institute the necessary default proceedings.

On November 1 the defendant again wrote to plaintiff's counsel disputing the sums due and requesting copy of the document in question.

The next contact between the parties occurred when plaintiff's counsel wrote the defendant on February 1, 1978, replying to defendant's earlier November 1 letter. In the February 1 letter plaintiff's counsel advised defendant that it was obtaining a copy of a check that defendant sought and would forward the check upon receipt. The letter concluded by stating:

> At this time we do not forsee any further information that you may need in evaluating your position. Since you have failed to file an answer in federal court as required by the Federal Rules of Civil Procedure, you leave us no choice but to request a hearing for a default judgment against you unless we hear from you concerning a firm offer of compromise in this case within five days of receipt of this letter.

This letter was returned to plaintiff's counsel marked "unclaimed."

On February 22 plaintiff filed a Motion for Entry of Default Judgment. Plaintiff's counsel mailed a copy of the Motion to the defendant on the same day. Entry of default was made by the Clerk of this court on February 23. On February 24 plaintiff filed a Motion for Default Judgment. Plaintiff's counsel mailed a copy of this motion to the defendant on the same day. On March 2 this court by order granted plaintiff's Motion for Default Judgment and set a hearing as to damages on March 21. On March 6 plaintiff's counsel mailed a letter to the defendant which advised him that a hearing on damages was set for March 21 and enclosed a copy of the court's order. This letter was sent "certified, return receipt requested." Having failed to receive the return receipt, on March 20 plaintiff's counsel was advised by the postal service that two notices had been given to the defendant regarding the letter and if it was not picked up on March 22 it would be returned. The defendant testified that he received the letter in the afternoon of March 21 after the hearing and entry of judgment that morning. Thereafter the defendant called plaintiff's counsel and went by his office on April 3 to discuss the judgment which had been rendered in this case.

At all relevant times the defendant utilized the address 1905 Southstone, Irving, Texas 75060, for his business and all correspondence by plaintiff's counsel to defendant was mailed to this address. On February 21, 1978, plaintiff's counsel's office telephoned the defendant and was advised by an answering service that defendant's address was 1905 Southstone, Irving, Texas. On occasions defendant's family signed for and received certified mail sent to the defendant at this address.

The defendant failed to explain why he did not claim

the February 1 letter advising him that the plaintiff was going to initiate default proceedings. Also, there is no evidence that the defendant did not receive the letters of February 22 and 24 advising him that plaintiff had moved for entry of default and for a default judgment. Although the defendant testified that he was working on jobs between March 6 and March 21, there is no evidence that these jobs prevented him from receiving the March 6 letter advising him of the March 21 hearing on damages before the afternoon of March 21. Further, members of the defendant's family, who had earlier received certified mail on his behalf, were not shown to have been unable to have received the March 6 letter within due course after it was mailed.

The defendant does not dispute that he was at fault on the Brownsville job; he only disputes the amount due the plaintiff on this job. The defendant does dispute liability to plaintiff on the Harris County job. However, the extent to which plaintiff's claim on the Brownsville job is not owed by the defendant and the nature of the defendant's defense to the Harris County job has not been demonstrated by the defendant.

Default judgments are a drastic remedy and courts are reluctant to grant them. *Charlton L. Davis & Company, P.C. v. Fedder Data Center,* 556 F.2d 308 (5th Cir. 1977). In considering a motion for relief from a default judgment, all doubts relating to the entry of the default judgment should be indulged in favor of the moving party. *Wright & Miller, Federal Practice and Procedure, Civl* §2693. If a party has appeared in an action, under Rule 55(b)(2), Fed. R. Civ. P., notice of an application for judgment must be served on such party at least three days prior to the hearing on the application. An appearance need not be a formal court

appearance, but may result when a defaulting party notifies an opponent of an intent to defend the action. In such a case, the defaulting party is entitled to notice under Rule 55(b)(2) of a motion for default judgment. *Charlton L. Davis & Company, P.C. v. Fedder Data Center, supra* at 309. Also under Rule 55(c), Fed. R. Civ. P., a party against whom a default judgment has been entered may obtain relief therefrom in accordance with Rule 60(b), Fed. R. Civ. P. Rule 60(b) provides that a court may grant relief to a party seeking relief from a judgment upon a showing of mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from the operation of the judgment.

In the exercise of a court's discretion in ruling on a motion for relief from a default judgment, the good faith or lack thereof of a party who has obtained a default judgment is a factor to be considered.

> When a party appears unduly anxious to win by default for example, if he fails to notify his opponent of the default — the court may be generous toward the party moving for relief under Rule 55(c). On the other hand, when the nondefaulting party endeavors to encourage the other party to respond, provides sufficient time for the opponent to correct the default, or does not press too rapidly for the entry of default and the subsequent judgment, a court typically will conclude that there is no reason to give the defaulting party relief.

Wright & Miller, Federal Practice and Procedure, Civil §2693. (Footnotes omitted). Additionally, one seeking relief from a default judgment under Rule 55(c) must show a

meritorious defense to the action, or, at least, "a hint of a suggestion (of a) meritorious defense. *Moelwood Corporation v. Stutts,* 410 F.2d 351, 352 (5th Cir. 1969); *United Artists Corporation v. Freeman,* 605 F.2d 854 (5th Cir. 1979).

The thrust of the defendant's motion for relief from the default judgment rendered against him is that he was not given notice of the default proceedings which the plaintiff undertook against him in February and March of 1978, and that he believed his letters to the plaintiff were a proper response to the suit. Testing the actions of the parties in the light of the foregoing, the court is of the opinion that the defendant is not entitled to be relieved of the default judgment rendered against him.

Following the institution of this suit, the parties continued their letter writing campaign that had gone on before the filing of this suit. Plaintiff made no effort to rush to the courthouse to secure a default but continued to make an effort to comply with the defendant's requests for information regarding the claims in dispute. However, in plaintiff's letter of October 17, 1977, it was made clear to the defendant that if he did not respond to plaintiff's demands for payment within three days default proceedings would be commenced. Although fully apprised that plaintiff would seek a default judgment, the defendant took no action, either by responding to plaintiff or filing an answer.

The plaintiff waited nearly three months before again advising the defendant by letter on February 1, 1978, that he had failed to file an answer in this case and he was subject to a default judgment being rendered against him. The plaintiff went on in this letter to again emphasize that unless the matter was settled within five days the plaintiff

would request a hearing for a default judgment. Although this letter was unclaimed by the defendant, its delivery was not the fault of the plaintiff but rather the defendant. The letter also evidences the plaintiff's good faith ongoing effort to get the defendant to take some action on its claims, either by settling the matters in dispute or by formally responding to the suit. This course of conduct by the plaintiff continued to be played out when the plaintiff sent the defendant a letter on February 22 enclosing a copy of a Motion for Entry of Default Judgment which it had filed and another letter on February 24 enclosing a copy of a Motion for Default Judgment. The defendant failed to take any action in response to this information. Following this, the plaintiff secured a hearing date before the court on the question of its damages and the plaintiff wrote the defendant a certified letter on March 6 and enclosed a copy of the court's order. Although the defendant did not receive this letter until the afternoon following the hearing on the morning of March 21, the delay in delivery was not the fault of the plaintiff. Rather it was due to the defendant's own neglect. Assuming that defendant was prevented from receiving the letter because of his work, he could have arranged for his family to obtain mail sent to him by plaintiff's counsel as was done in the past.

If it be assumed that the defendant's letters to the plaintiff evidenced an intent by the defendant to defend against this suit which entitled the defendant to notice of default proceedings, *Charlton L. Davis & Company, P.C. v. Fedder Data Center, supra,* the letters of February 1, 22 and 24, and March 6 from plaintiff's counsel gave the defendant notice that plaintiff would move for default, had secured a default, had moved for default judgment, that default

judgment had been entered and that a hearing on the amount of damages would be heard on March 21. The defendant was given adequate notice required under Rule 55(b)(2) that default judgment proceedings were being initiated by the plaintiff and his claim to the contrary is without merit.

This court's conclusion is supported by the holdings in *Port-Wide Containers Co. v. Interstate Maintenance Corp.*, 440 F.2d 1195 (3rd Cir. 1971), and *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655 (7th Cir. 1956), in which default judgments were upheld where notice of default proceedings had been given to a defaulting party who had indicated an intent to defend. In *Port-Wide* notice was given to an employee of the defaulting party who did not transmit the notice. In *Rutland* oral notice was given of the default proceedings. *See, also, Wilson v. Moore and Associates, Inc.*, 564 F.2d 366 (9th Cir. 1977) (dissenting opinion) (Notice to defaulting party of default proceedings not required when plaintiff's attorney earlier gave notice to defaulting party that delay in answering would result in default).

The defendant's contention that he should be relieved of the default judgment because he felt that his letters were the proper way to defend against plaintiff's suit is likewise without merit. Plaintiff's letters made it clear to the defendant that he was in default because he had failed to answer the suit. There was no intimation in these letters that the defendant's conduct would suffice as a proper response to the suit or would insulate him from default proceedings. The defendant could not have been misled in any way by these letters as to the serious consequences that would flow from his failure to take some affirmate action to

legally defend against the suit. The evidence does not support any basis for granting the defendant relief under Rule 60(b).

Plaintiff also showed no eagerness to obtain a quick default judgment, but, to the contrary, waited five months before formally taking steps to default the defendant and to secure a judgment. This gave the defendant more than enough time to correct his default. He simply ignored his responsibilities to formally respond to this suit.

Further, even though a defendant seeking relief from a default judgment needs to show only a "hint" of a meritorious defense, the defendant has failed to make such showing. He admits liability on the Brownsville job and only disputes the amount. Yet, his evidence failed to "hint" what amounts were disputed and why they were disputed. On the Harris County job the defendant disputed liability but he failed to "hint" at any reason why he was not liable.

For the foregoing reasons the defendant's Motion to Set Aside Final Judgment should be denied.

It is so ORDERED.

Dated this 4th day of January, 1980.

/s/ Robert M. Hill,
United States District Judge

PROCEEDINGS IN THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1118
Summary Calendar

HOWE RICHARDSON SCALE COMPANY,

Plaintiff-Appellee,

versus

WILLIAM H. SPENCER, INDIVIDUALLY AND d/b/a IRVING EQUIPMENT AND CONSTRUCTION COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

(AUGUST 25, 1980)

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

Affirmed on the basis of the Order of the United States District Court for the Northern District of Texas, dated January 4, 1980, denying defendant's Motion to Set Aside Final Judgment.
AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 80-1118

HOWE RICHARDSON SCALE COMPANY,

Plaintiff-Appellee,

versus

WILLIAM H. SPENCER, INDIVIDUALLY AND
d/b/a IRVING EQUIPMENT AND
CONSTRUCTION COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
ON PETITION FOR REHEARING

(October 15, 1980)

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS SO ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Robert Ainsworth,
United States Circuit Judge

OTHER MATERIALS

DEFENDANT'S EXHIBIT NO. "1"

CLARK, WEST, KELLER, SANDERS & BUTLER
Attorneys and Counselors at Law
2424 First National Bank Building
Dallas, Texas 75202

July 14, 1977

CERTIFIED
RETURN RECEIPT REQUESTED

Mr. William H. Spencer
Irving Equipment & Construction Company
1905 Southstone Lane
Irving, Texas 75060

Dear Mr. Spencer:

This firm has been retained by Howe Richardson Scale Company to represent it in connection with your company's construction of certain truck weighing scales foundations located in Houston and Brownsville, Texas.

As you are aware, the work you performed under contract for Howe Richardson at both sites was unacceptable and required reconstruction of both foundations and reinstallation of both scales. At the Anglo Iron and Metal Company job in Brownsville, Howe Richardson incurred reconstruction costs in the amount of $3,863.85 and satisfied invoices owed by your company in the amount of $2,060.64, for a total expenditure of $5,924.49.

At the Harris County Public Scale job in Houston,

Howe Richardson incurred reconstruction expenses in the amount of $14,885.74 and down time penalties during the reconstruction in the amount of $13,300.00, totalling $28,-185.74.

The above expenditures were necessary to remedy your faulty performance on those two jobs. In addition, you were paid in full for the Houston job and partially paid for the Brownsville job. Since both jobs had to be completely reconstructed you failed to perform in accordance with the agreements executed by you on behalf of your company.

Howe Richardson makes formal demand for payment of all reconstruction expenditures and contract payments totalling $34,110.23. Please forward this amount by certified check or cashier's check payable to Howe Richardson Scale Company to the undersigned at the above address within ten days of receipt of this letter to avoid the necessity of expensive litigation including the possible recovery of attorneys' fees and costs of court.

Very truly yours,
CLARK, WEST, KELLER,
SANDERS & BUTLER
/s/ Steven R. McCown

SRMCC:JN

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY,

Plaintiff,

vs. No. CA 3-77-1239-D

WILLIAM H. SPENCER, INDIVIDUALLY AND d/b/a IRVING EQUIPMENT AND CONSTRUCTION COMPANY,

Defendant.

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Steven R. McCown plaintiff's attorney, whose address is Clark, West, Keller, Sanders & Butler, 2424 First National Bank Building, Dallas, Texas 75202 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Joseph McElroy, Jr.,
Clerk of Court
/s/ Mary S. Ramos,
Deputy Clerk

DATE: 9-12-77

DEFENDANT'S EXHIBIT NO. "7"

September 12, 1977

Mr. Steven R. McCown
Clark, West, Keller, Sanders & Butler
2424 First National Bank Bldg.
Dallas, Texas 75202

Dear Mr. McCown:

In reply to your letter dated August 21, 1977, we would like to call your attention to C. R. Buddy Smith's invoice No. 506 dated November 21, 1976 in the amount of $3,863.88 and Howe Richardson's check No. 328237 dated January 21, 1977 in amount of $5,354.85. We would like an explanation for the difference of $1,490.97.

It is my understanding that the only repair needed on the Brownsville job was the deck. The extra charges for removal and replacement of neck deck, repair of existing concrete alongside the scale, two approaches and two extra days labor were not covered on P.O. No. 70241 and is not my liability.

My invoice No. 8649 dated March 19, 1976 in the amount of $4,675.00 was never paid. The partial payment made to Valley Ready Mix in the amount of $2,060.64 leaves a balance owed to me of $2,614.36. It is my feeling that this balance should be used as a credit for the amount that is being billed to me.

Regarding the Houston job, Howe Richardson P.O. No. 72047 was for pit construction and scale installation only. Please explain why we are being billed for the approaches poured by Earl Collum Construction Co.

On the Joint and Mutual Release form between Dennis Yidwell and Howe Richardson Scale Company, it states that Howe Richardson gave Harris County Public Scales a credit in the amount of $13,300.00 leaving a balance to be paid to Howe Richardson of $7,047.15. This is not verification that the actual transaction took place.

Sincerely yours,

IRVING EQUIPMENT &
CONSTRUCTION CO.
/s/ W. G. Spencer

DEFENDANT'S EXHIBIT NO. "8"

September 26, 1977

Mr. Steven R. McCown
Clark, West, Keller, Sanders & Butler
2424 First National Bank Bldg.
Dallas, Texas 75202

Dear Mr. McCown:

This letter is to comply to your summons dated September 12, 1977, which I believe is getting the cart before the horse.

We wrote you a letter which had questions to pertinent facts concerning the amount in question. Please give me the benefit of the doubt of having enough common sense not to pay an amount that I am not sure I owe.

Please find enclosed a copy of my letter dated September 12, 1977.

Sincerely yours,

IRVING EQUIPMENT &
CONSTRUCTION CO.
/s/ W. G. Spencer

DEFENDANT'S EXHIBIT NO. "9"

CLARK, WEST, KELLER, SANDERS & BUTLER
Attorneys and Counselors at Law
2424 First National Bank Building
Dallas, Texas 75202

October 17, 1977

CERTIFIED RETURN RECEIPT REQUESTED

Mr. W. G. Spencer
Irving Equipment & Construction Co.
1905 Southstone
Irving, Texas 75060

Re: Howe Richardson Scale Company v. William H. Spencer, individually and d/b/a Irving Equipment and Construction Company

Dear Mr. Spencer:

Howe Richardson Scale Company informs me that all work reflected on C. R. Buddy Smith's invoices was required to correct faulty construction by you on the two jobs in question. The discrepancy in payment referred to by you in your September 12, 1977, letter is not a discrepancy at all. Please total the entire amount of all invoices submitted by Mr. Smith for both reconstructions and the results should equate to Howe Richardson's total payments.

With regard to your invoice No. 8649 and requested credit, Howe Richardson takes the position that your faulty construction was of no benefit to it or the customer and no credit should be allowed since your work had to be reperformed. Finally, with regard to verification of the Harris County Public Scales down charges, you can certainly

understand that Howe Richardson does not have Harris County's cancelled checks. However, if you seriously wish to satisfy your obligations without resort to additional legal proceedings, we will be happy to attempt to obtain a copy of this check from Harris County.

Inasmuch as you have requested this additional information, Howe Richardson has postponed the institution of default proceedings against you. If no further response is received from you within three (3) days of receipt of this letter, Howe Richardson will proceed to institute the necessary default proceedings.

Very truly yours,

CLARK, WEST, KELLER,
SANDERS & BUTLER
/s/ Steven R. McCown

SRMCC:JN

DEFENDANT'S EXHIBIT NO. "10"

November 1, 1977

Mr. Steven R. McCown
Clark, West, Keller, Sanders & Butler
2424 First National Bank Building
Dallas, Texas 75202

Dear Mr. McCown:

In reply to your letter of October 17, 1977, all the work reflected on C. R. Buddy Smith's invoices was not required to correct faulty construction on the two jobs in question. In our letter dated September 12, 1977, we referred to the purchase orders for both jobs which would explain what our liability is. Please research this more thoroughly and you will be aware that Howe Richardson Scale Co. has informed you incorrectly.

Regarding the discrepancy in payment, we have totaled the invoices for both jobs and checks for both jobs and there is definitely a discrepancy in excess of $1,400.00.

Please explain how Howe Richardson Scale Co. can expect any payment at all from us for the Brownsville job when we were never paid for it. Even though the deck, being 25% of the job, was faulty construction, a floor and piers, the side and end walls, being 75% of the job, are still being used. I take the position of compensation is due or no payment by me is considered.

In regard to Harris County Public Scale job, we are very serious about obtaining copies of checks for proof of payment for the express reason that the Howe Richardson Scale Co.'s management is not beyond a cover-up situation.

Please have Howe Richardson Scale Co. supply you with detailed information, such as purchase orders and invoices, so that we will be able to agree on a settlement.

Sincerely,

IRVING EQUIPMENT &
CONST. CO.
/s/ W. G. Spencer